



Volume 18 (2021) | ISSN 1932-1821 (print) 1932-1996 (online)
DOI 10.5195/taxreview.2021.136 | <http://taxreview.law.pitt.edu>

NOTE

NIL BILLS—AN EXAMINATION OF THE IMPLICATIONS OF COMPENSATING COLLEGE ATHLETES UNDER NAME, IMAGE, AND LIKENESS LEGISLATION

Brian P. Bunner



This work is licensed under a Creative Commons Attribution-NonCommercial-No Derivative Works 3.0 United States License.



This journal is published by the [University Library System](#) of the [University of Pittsburgh](#) as part of its [D-Scribe Digital Publishing Program](#), and is cosponsored by the [University of Pittsburgh Press](#).

NOTE

NIL BILLS—AN EXAMINATION OF THE IMPLICATIONS OF COMPENSATING COLLEGE ATHLETES UNDER NAME, IMAGE, AND LIKENESS LEGISLATION

*Brian P. Bunner**

I. INTRODUCTION: THE CURRENT SYSTEM AND “NAME, IMAGE, AND LIKENESS” LEGISLATION

American college athletics is a multi-billion-dollar business, managed and governed by the National Collegiate Athletic Association (NCAA).¹ The NCAA is a nonprofit organization whose governing body consists of various representatives from its member schools.² In 2016, NCAA Division I athletics programs raked in over \$2 billion in profits.³ Student-athletes did not see a dime of these profits. Strict NCAA regulations have long prohibited college athletes from being compensated for their athletic performance, directly or indirectly.⁴ State legislatures are looking to overrule the NCAA: On September 30, 2019, California signed into law Senate Bill 206 allowing college athletes in the state to “earn[] compensation as a result of the use of the student’s name, image, or likeness” as long as such compensation does

* JD, University of Pittsburgh School of Law, 2020.

¹ Eben Novy-Williams, *QuickTake: College Sports*, BLOOMBERG (Sept. 27, 2017), <https://www.bloomberg.com/quicktake/college-sports-ncaa>.

² *What Is the NCAA?*, NCAA, <http://www.ncaa.org/about/resources/media-center/ncaa-101/what-ncaa> (last visited Apr. 23, 2021).

³ Novy-Williams, *supra* note 1; *see also* Darren Rovell, *NCAA Tops \$1 Billion in Revenue During 2016-17 School Year*, ESPN (Mar. 7, 2018), https://www.espn.com/college-sports/story/_/id/22678988/ncaa-tops-1-billion-revenue-first.

⁴ NCAA BYLAWS 12.1.2, –2.1; *see also* *Amateurism*, NCAA, <http://www.ncaa.org/student-athletes/future/amateurism> (last visited Apr. 23, 2021).

not violate team rules.⁵ Other states have boarded the bandwagon: some thirty states are considering similar “name, image, and likeness” (NIL) legislation.⁶ State legislatures in Florida, New York, South Carolina, Virginia, and Washington have introduced bills similar to California’s.⁷

After initially threatening to sideline any colleges that allow players to be paid under the bills from participation in NCAA championships and opposing the bills as unconstitutional, the NCAA has—at least nominally—changed its tune.⁸ In October 2019, the NCAA Board of Governors voted unanimously to “permit students participating in athletics the opportunity to *benefit* from the use of their name, image, and/or likeness.”⁹ However, the resolution “make[s] clear that compensation for athletics performance . . . is impermissible,”¹⁰ and the NCAA’s position remains that in order “to maintain NCAA eligibility, Division I student-athletes may not promote or endorse a commercial product or service, even if they are not paid to participate in the activity.”¹¹

⁵ CAL. EDUC. CODE § 67456 (West, Westlaw through ch. 16 of 2021 Reg. Sess.); S.B. 206, 2019 Cal. Legis. Serv. 99 (West). The California law goes into effect on January 1, 2023.

⁶ Brian Murphy, *With States Poised to Let College Athletes Make Money, NCAA Goes to Congress for Help*, RALEIGH NEWS & OBSERVER (Dec. 17, 2019), <https://www.newsobserver.com/sports/college/article238439513.html>.

⁷ S.B. 646, 2020 Leg., Reg. Sess. (Fla. 2020); S.B. 6761, 2019–2020 Leg., Reg. Sess. (N.Y. 2019); S.B. 935, 123rd Gen. Assemb., Reg. Sess. (S.C. 2019); H.B. 300, 2019 Leg., Reg. Sess. (Va. 2019); H.B. 1084, 66th Leg., Reg. Sess. (Wash. 2019). Florida’s bill has since been signed into law and is set to go into effect in July 2021. FLA. STAT. ANN. § 1006.74 (West, Westlaw through ch. 6 of 2021 First Reg. Sess.); see Rudy Hill & Jonathan Wohlwend, *Florida Law Will Allow College Athletes to Profit from Name, Image, and Likeness Starting Summer 2021*, BRADLEY (June 25, 2020), <https://www.bradley.com/insights/publications/2020/06/florida-law-will-allow-college-athletes-to-profit-from-name-image-and-likeness-starting-summer-2021>.

⁸ Sam Cooper, *Report: NCAA Threatening to Bar California Schools from Championships Over Name, Image, Likeness Bill*, YAHOO! SPORTS (June 24, 2019), <https://sports.yahoo.com/report-ncaa-threatening-to-bar-california-schools-from-championships-over-name-image-likeness-bill-144909249.html>.

⁹ NCAA, REPORT OF THE NCAA BOARD OF GOVERNORS: OCTOBER 29, 2019 MEETING, at 3 (2019) (emphasis added).

¹⁰ *Id.*

¹¹ Rachel Stark-Mason, *Name, Image, and Likeness*, NCAA, <http://www.ncaa.org/champion/name-image-likeness> (last visited Dec. 16, 2020).

Congress has also responded to these bills, first forming a committee (whose first meeting was with the NCAA President) to discuss student-athlete compensation and related issues.¹² More recently, Representative Anthony Gonzalez, a former Ohio State football player, has introduced in Congress the Student Athlete Level Playing Field Act.¹³ Under this legislation, the NCAA would be effectively prohibited from disallowing players from participating in NCAA-sanctioned events for receiving certain endorsement deals.¹⁴

The age-old cry for college athletes to be permitted to profit from their participation in intercollegiate athletics has reached a tipping point.¹⁵ As the NCAA, state legislatures, and Congress decide exactly how college athletes will be paid, another problem lies just beneath the surface: how will these athletes and universities be taxed under either a state or federally regulated NIL model? A state-regulated NIL compensation system will cause a plethora of tax implications for college athletes and in some cases create perverse economic incentives. The pending federal NIL legislation fails to solve the issue, as it would continue to allow states to create a nonuniform system, where each state would be permitted to create its own laws regarding student-athlete compensation.¹⁶ Thus, I propose that complete federal oversight of student-athlete compensation is required to create a system where student-athletes are permitted to be fairly compensated for the use of their NIL while also maintaining national uniformity in the system in order to attenuate the perverse economic incentives created by a state-regulated NIL compensation system.

Parts II and III provide background on the NCAA, its tax-exempt status, and the payment of college athletes. Part IV discusses the common features of state NIL bills and examines the issues that these NIL bills might create, including school shopping and jock taxes. In Part V, South Carolina's unique

¹² Murphy, *supra* note 6.

¹³ Student Athlete Level Playing Field Act, H.R. 8382, 116th Cong. (2020).

¹⁴ *Id.* § 2(a)(2). For example, the bill would allow the NCAA to prohibit college athletes from signing endorsement deals for adult products such as tobacco, marijuana, or gambling.

¹⁵ Murphy, *supra* note 6.

¹⁶ *See generally* H.R. 8382.

NIL bill is discussed. In Part VI, I propose a federal solution to the NIL bill problem.

II. BACKGROUND ON THE NCAA, “AMATEURISM,” AND THE PAYMENT OF COLLEGE ATHLETES

Before I begin to address the current state of the NCAA and the issues surrounding NIL legislation, I believe that it is important to briefly summarize the history of the NCAA. The NCAA was formed in 1906, originally named the “Intercollegiate Athletic Association of the United States,” changing its name to the NCAA in 1910.¹⁷ The organization was initially formed to create a rules committee to govern intercollegiate football, as football players in those days often suffered serious injuries and even death on the playing field.¹⁸

By the 1950s, college athletics began to flourish. The NCAA expanded its scope not only to establish uniform rules for sports other than football but also to regulate areas outside the rules of the game, namely, “exploitive practices in the recruitment of student-athletes.”¹⁹ In short, as Americans became more entranced by college sports, the NCAA continually expanded its regulatory power over collegiate athletics to the point we have arrived at today. Now, the NCAA signs television broadcasting rights contracts, establishes scholarships for student-athletes, and has created a complex set of rules and enforcement mechanisms to punish players, coaches, and schools that violate its rules.²⁰

Within the NCAA’s complex regulations is the rule that student-athletes must maintain “amateur” status to participate in NCAA-sanctioned athletic

¹⁷ *NCAA and the Movement to Reform College Football: Topics in Chronicling America*, LIBR. OF CONG., <https://guides.loc.gov/chronicling-america-ncaa-college-football-reform> (last visited Dec. 16, 2020).

¹⁸ *Id.*

¹⁹ Rodney K. Smith, *A Brief History of the National Collegiate Athletic Association’s Role in Regulating Intercollegiate Athletics*, 11 MARQ. SPORTS L. REV. 9, 14 (2000). A full discussion of the NCAA’s history is beyond the scope of this paper, but Rodney Smith’s article provides a wonderful summary.

²⁰ *Id.* at 21.

events.²¹ So, what does it mean to be an “amateur”? The dictionary definition of “amateur” is “a person who engages in a study, sport, or other activity for pleasure rather than for financial benefit or professional reasons.”²²

Although the NCAA’s definition of “amateur” has changed over the course of its nearly 150-year history, it has always seemed to focus on maintaining fairness by disallowing student-athletes to accept financial rewards or inducement for their participation in college sports.²³ To maintain “amateur” status under current NCAA rules, students are prohibited from (1) accepting payment of any kind for participation in collegiate athletics, (2) playing on professional (as compared with amateur) sports teams, and (3) signing a contract to be represented by an agent.²⁴ While some may agree with the NCAA that prohibiting student-athletes from being financially induced to play sports maintains the integrity of the game, others, including myself, believe that the NCAA system is simply an organization that has overstepped its regulatory boundaries and now needlessly prohibits student-athletes from profiting not only from their talents on the field, but also from their very own names, images, and likenesses.²⁵

III. TAX-EXEMPT STATUS OF THE NCAA AND ITS MEMBER INSTITUTIONS AND QUALIFIED SCHOLARSHIPS

Before addressing NIL bills and their consequences, it is important to understand how the NCAA and its member institutions maintain their tax-exempt status. Currently, the NCAA and many of its participant schools are

²¹ NCAA BYLAWS 12.1.2.

²² *Amateur*, DICTIONARY.COM, <https://www.dictionary.com/browse/amateur?s=t> (last visited Jan. 3, 2020); cf. *Professional*, BALLANTINE’S LAW DICTIONARY (3d ed. 1969) (“[P]rofessional . . . One who has concentrated his efforts upon performing as art for pay as a means of subsistence, *as distinguished from the amateur* who engages for the sake of art or his own pleasure.”) (emphasis added).

²³ A full discussion of the development of “amateurism” is beyond the scope of this paper. For a full discussion, see Kristen R. Muenzen, *Weakening Its Own Defense? The NCAA’s Version of Amateurism*, 13 MARQ. SPORTS L. REV. 257 (2003).

²⁴ NCAA BYLAWS 12.1.2.

²⁵ See Dan Treadway, *Why Does the NCAA Exist?*, HUFFPOST (Dec. 6, 2007), https://www.huffpost.com/entry/johnny-manziel-ncaa-eligibility_b_3020985, for a scathing review of the NCAA and its “amateurism” stance.

generally exempt from federal income tax as “charitable organizations,”²⁶ while many other participant schools are generally tax-exempt under the doctrine of intergovernmental immunity.²⁷ Although there are differences between the schools that are tax-exempt by way of intergovernmental immunity and those that claim tax exemption as charitable organizations, a discussion that is beyond the scope of this Note,²⁸ these schools face many of the same issues. The NCAA’s private member universities maintain their status as charitable organizations by maintaining that their primary purpose is the promotion of education.²⁹ The NCAA maintains its tax-exempt status by claiming that its primary purpose is “fostering . . . amateur athletics.”³⁰ Section 512 states generally that if a charitable organization *regularly* carries on a trade or business that is not substantially related to furthering the exempt purpose of the organization, the income derived from such business will be considered “unrelated business income” and therefore subject to federal income tax.³¹ However, it must be emphasized that “an activity does not lose identity as a trade or business merely because it is carried on . . . within a larger complex of other endeavors which may, or may not, be related to the

²⁶ See I.R.C. § 501(c)(3), (j).

²⁷ See generally *id.* § 115.

²⁸ See generally Ellen P. Aprill, *The Integral, the Essential and the Instrumental: Federal Income Tax Treatment of Governmental Affiliates*, 23 J. CORP. L. 803 (1998) (discussing how an intergovernmental organization achieves tax-exempt status).

²⁹ Note that only private member schools need to claim federal tax exemption under § 501(c)(3) because

[u]nlike private universities and the NCAA, which rely for their federal income tax exemption on Code § 501(c)(3), public universities generally are exempt from federal income tax either under the broad constitutional doctrine of intergovernmental tax immunity, or else under Code § 115, which exempts the income of States or “any political subdivision thereof” derived from “the exercise of any essential governmental function.”

John D. Colombo, *The NCAA, Tax Exemption, and College Athletics*, 2010 U. ILL. L. REV. 109, 133.

³⁰ NCAA BYLAWS 20.9.1.1.

³¹ I.R.C. § 512(c); see also *Unrelated Business Income Defined*, INTERNAL REVENUE SERV., <https://www.irs.gov/charities-non-profits/unrelated-business-income-defined> (last updated Mar. 17, 2021); cf. *Nat’l Collegiate Athletic Ass’n v. Comm’r*, 914 F.2d 1417, 1418 (10th Cir. 1990) (holding that the sale of “program advertising” during the NCAA’s March Madness basketball tournament does not constitute “unrelated business income”).

exempt purposes of [an] organization.”³² The activity must be *regularly* carried on to be subject to the unrelated business income tax (UBIT).³³ Moreover, in the context of the NCAA and college sports, certain items may be specifically excluded from UBIT, such as “reasonable” salaries for coaches.³⁴

Additionally, many student-athletes currently receive athletic scholarships covering all or part of the cost of tuition and fees, room and board, and textbooks.³⁵ Athletic scholarships are generally exempt from federal income tax as long as they cover only “tuition and fees required for enrollment or attendance” and “fees, books, and equipment required for courses,” and no part of the scholarship is “payment for . . . services by the student required as a condition for receiving the qualified scholarship.”³⁶ This means there cannot be a *quid pro quo* relationship whereby the recipient’s participation in the athletic activity is a prerequisite for receiving the scholarship funds.³⁷

³² *Nat’l Collegiate Athletic Ass’n*, 914 F.2d at 1421 (quoting § 513(c)). The Tenth Circuit Court of Appeals takes the position that the Final Four Championship is part of the NCAA’s “charitable purpose” of fostering amateur athletics, and, as mentioned *supra* note 31, “program advertising” during that short period of time did not cause the tournament to lose its overall charitable purpose of fostering amateur sports (“supervis[ing] the conduct of . . . regional and national athletic events under the auspices of [the NCAA]”). *Nat’l Collegiate Athletic Ass’n*, 914 F.2d at 1419.

³³ See Treas. Reg. § 1.513-1(c)(1) (as amended in 2020).

³⁴ See I.R.C. § 4960. However, as Ellen Aprill notes, Congress fumbled with respect to this provision, inadvertently exempting high-paid public university coaches from this excise tax. Ellen P. Aprill, *Congress Fumbles the Ball on Section 4960*, MEDIUM (Dec. 26, 2017), <https://medium.com/whatever-source-derived/congress-fumbles-the-ball-on-section-4960-guest-postby-ellen-aprill-18a2dbf98c5f>; see also David Jolly, *Rules for “Coach Tax” on Nonprofits Go to White House for Review*, BLOOMBERG LAW (Jan. 5, 2021, 8:57 AM), <https://news.bloombergtax.com/daily-tax-report/rules-for-coach-tax-on-nonprofits-go-to-white-house-for-review>.

³⁵ *Scholarships*, NCAA, <http://www.ncaa.org/student-athletes/future/scholarships> (last visited Jan. 11, 2020).

³⁶ I.R.C. § 117(a)–(c); see also Rev. Rul. 77-263, 1977-2 C.B. 47 (“[t]he value of athletic scholarships, which may not exceed expenses for tuition, fees, room, board, and necessary supplies, awarded to students by a university that expects but does not require the students to participate in a particular sport, requires no particular activity in lieu of participation, and does not cancel the scholarship if the student cannot participate is excludable from the recipient’s gross income under [I.R.C. § 117]”).

³⁷ Rev. Rul. 77-263, *supra* note 36; Justin Morehouse, *When Play Becomes Work: Are College Athletes Employees?*, 144 TAX NOTES 1427, 1429 (2014).

Amounts received by student-athletes for travel expenses, meals and lodging, and/or equipment are also excludable from federal income tax “provided that such expenses are incident to a [qualified] scholarship.”³⁸ The majority of the proposed NIL bills contain provisions stating that scholarships for the cost of attendance will not be considered “compensation” under the respective legislation for state income tax purposes.³⁹

IV. NIL BILLS: COMMONALITIES AND CONSEQUENCES

A. Commonalities Among NIL Bills

As discussed in the introduction above, California and Florida have both signed NIL bills into law, and New York, South Carolina, Virginia, and Washington have introduced similar NIL bills in their respective legislatures.⁴⁰ These bills share several common features, but they are not identical. All the bills (1) entitle collegiate student-athletes to earn compensation for the use of their name, image, and likeness, (2) entitle student-athletes to hire an agent to represent them in such matters, and (3) prohibit the NCAA or other private regulatory organizations from disallowing colleges and their student-athletes from participation in their organization on the basis of student-athletes’ profiting from their NIL.⁴¹ Four of the bills also provide that college sports teams are permitted to implement team rules prohibiting student-athletes from earning compensation for their name, image, and likeness during “official team activities,” but not outside of such activities.⁴²

Four of the proposed bills provide that scholarship eligibility will not be affected by a student-athlete being compensated for use of his or her NIL.⁴³

³⁸ Treas. Reg. § 1.117-1(b)(1) (as amended in 1960).

³⁹ See, e.g., CAL. EDUC. CODE § 67456 (West, Westlaw through ch. 16 of 2021 Reg. Sess.); H.B. 300, 2019 Leg., Reg. Sess. (Va. 2019).

⁴⁰ See *supra* notes 5–7 and accompanying text.

⁴¹ EDUC. § 67456(a)–(c); S.B. 646, 2020 Leg., Reg. Sess., § 1 (Fla. 2020); S.B. 6761, 2019–2020 Leg., Reg. Sess., §§ 1–3 (N.Y. 2019); S.B. 935, 123rd Gen. Assemb., Reg. Sess., § 1 (S.C. 2019); H.B. 300, 2019 Reg. Sess. § 1(B)(2), (C) (Va. 2019); H.B. 1084, 66th Leg., Reg. Sess. §§ 1, 2 (Wash. 2019).

⁴² EDUC. § 67456; Fla. S.B. 646; N.Y. S.B. 6761; Va. H.B. 300 § 1(B)(2), (C).

⁴³ EDUC. § 67456(a)(1); Fla. S.B. 646 § 1; N.Y. S.B. 6761 § 1; Va. H.B. 300 § 1.

Of those four bills, two also provide that scholarships for the cost of attendance are not considered “compensation” for purposes of the statute and/or state income tax purposes.⁴⁴ Thus, from both a tax and economic perspective, a nonuniform, *state*-regulated framework of *national* college athletics will be problematic for the national collegiate athletic system.⁴⁵

B. Consequences to the NCAA and Member Institutions

Recall that three of the proposed NIL bills contain provisions stating that (1) a student-athlete’s team cannot put in place rules prohibiting student-athletes from earning compensation for the use of their NIL and (2) the NCAA and other governing organizations are prohibited from disqualifying student-athletes and schools from membership in their organization on the basis that the student-athletes are compensated for their NIL.⁴⁶

Now suppose, for example, that a student-athlete—let’s call him Joe—is a football player at University *Y*, a member school of the NCAA located in a state permitting NIL compensation. Under the state NIL law, the NCAA’s rules barring Joe from being compensated for the use of his NIL will be stricken or voided as illegal.⁴⁷ If University *Y* or the NCAA wishes to use Joe’s football highlights or a picture of Joe in his football jersey in a promotion or advertisement, Joe will almost certainly demand compensation for the use of his NIL under the statute. Joe’s compensation will be

⁴⁴ EDUC. § 67456(d); Va. H.B. 300 § 1.

⁴⁵ *Questions and Answers on Name, Image and Likeness*, NCAA, <http://www.ncaa.org/questions-and-answers-name-image-and-likeness> (last visited Jan. 1, 2020) (suggesting that state regulation of NIL compensation of student-athletes will result in “undue influence on a student’s choice of where to attend college”).

⁴⁶ See Eric Carlson, *Unsportsmanlike Conduct: Why the NCAA Should Lose Its Tax-Exempt Status if Scholarship Athletes Are Considered Employees of Their Universities*, 66 SYRACUSE L. REV. 157, 171 (2016).

⁴⁷ See, e.g., S.B. 935, § 1 123rd Gen. Assemb., Reg. Sess. (S.C. 2019) (adding § 59-157-20(B)) (“A state or national federation or association that promotes or regulates intercollegiate sports, including, but not limited to, the [NCAA], shall not prevent a student athlete of an institution of higher learning who is participating in intercollegiate sports from earning compensation as a result of the use of the student athlete’s name, image, or likeness.”).

considered taxable gross income to him for federal income tax purposes.⁴⁸ If the NCAA or the university enters into such a contract, Joe would be indirectly receiving compensation for his athletic participation, and, therefore, by the NCAA's own rules, Joe will not be considered an amateur athlete.⁴⁹ Thus, if the NCAA were forced to sign such contracts on a large-scale basis and the IRS considered the NCAA's own rules or even the dictionary definition of *amateur* in determining whether the NCAA would still qualify as "primarily" engaged in promoting "amateur" sports and/or education, the NCAA would be at risk of losing its tax exemption with respect to that income as "unrelated business income."⁵⁰

Similarly, a university signing NIL compensation contracts with its players would also be at risk of losing its tax exemption because the players might be considered "employees" of the university.⁵¹ If student-athletes signing NIL contracts with universities were considered "employees" of the university and the IRS chose to interpret such contracts as compensation—whether direct or indirect—for the student-athlete's participation in athletics, then the university's athletic program could be seen as an unrelated business (i.e., neither fostering amateur sports nor promoting education), and, therefore, all of its profits from its athletics program could be considered unrelated business income subject to federal income tax under § 512(c).

However, the IRS has historically given the NCAA a long leash with respect to what it can include in its "charitable purposes." For example, in Revenue Ruling 80-296, though not by name, the IRS states that even television broadcasting rights can be included in the broad charitable purpose of the NCAA.⁵²

⁴⁸ I.R.C. § 61(a)(1) ("[G]ross income means all income from whatever source derived, including . . . [c]ompensation for services . . .").

⁴⁹ See Carlson, *supra* note 46, at 171 ("According to the NCAA's own bylaws, the hallmark of an amateur athlete is being uncompensated. If scholarship Division I football players are *compensated* employees then by the NCAA's own definition, they are not amateurs.")

⁵⁰ *Id.* at 168–69; see also I.R.C. § 512(c).

⁵¹ See Carlson, *supra* note 46, at 176.

⁵² Rev. Rul. 80-296, 1980-2 C.B. 195.

C. Consequences to Student-Athletes

If university athletics programs were to lose their tax-exempt status under NIL bills as unrelated business income, then athletic scholarships might be considered compensation for student-athletes' performance in the sport as well. Student-athletes would then no longer be entitled to exclude scholarship funds from their federal gross income, subjecting them to federal income tax upon receipt of the scholarship.

This may seem like a harsh result, and it is unlikely that the IRS would approach the issue in this way, as they have been favorable to college athletics in the past, but it is possible, and these interpretations and suggestions are not new. Even before NIL legislation began to proliferate, it was suggested that student-athletes are or should be treated as employees of the school and that scholarships are a form of compensation and should be taxed as such.⁵³

D. School Shopping and Jock Taxes

From a purely economic perspective, leaving the NCAA in place and allowing a state-regulated model for paying college athletes will give colleges in states that allow compensation for the use of athletes' NIL a recruiting advantage over states that do not allow it.⁵⁴ Suppose a prospective student-athlete is offered a full-ride athletic scholarship to two schools that are identical in terms of athletic program strength and brand, academic prestige, campus culture, and all other relevant considerations except that one is in a state that allows student-athletes to profit from their NIL and the other is in a state that does not. All things being equal, an economically rational prospective student-athlete will choose a school where he has the opportunity to profit from his NIL while participating in college athletics over a school

⁵³ See generally Patrick C. Johnston, *Northwestern Football and College Athletics: Be Careful What You Wish for*, 49 J. MARSHALL L. REV. 655 (2015).

⁵⁴ Ari Wasserman, *Endorsement Deals Are Coming for Student-Athletes, Even if Ohio State AD Gene Smith Doesn't Know What That Will Look Like*, ATHLETIC (Oct. 1, 2019), <https://theathletic.com/1258813/2019/10/01/endorsement-deals-are-coming-for-student-athletes-even-if-ohio-state-ad-gene-smith-doesnt-like-it> (quoting Gene Smith, Ohio State University Athletic Director and Co-Chair of the NCAA Board of Governors Federal and State Legislation Working Group and discussing the competitive recruiting advantage that NIL bills will produce).

where he is prohibited from doing so.⁵⁵ This “school shopping” problem is amplified when tax considerations are added into the equation.⁵⁶ Colleges in states that do not have a personal income tax *and* permit NIL compensation will have an even larger recruiting advantage because they will be able to flaunt the opportunity for prospective student-athletes to profit from their NIL *and* pay no state income tax on such profits.⁵⁷

State legislatures that do not want to pass NIL legislation may seek a way to even the playing field in another way, through “jock taxes.” “Jock taxes” are taxes levied by state or local taxing bodies against visiting individuals—typically, entertainers and professional athletes—who earn money in the taxing body’s jurisdiction.⁵⁸

V. SOUTH CAROLINA NIL BILL’S UNIQUE FEATURES

A. Athletics Trust Fund and Stipend Payments

South Carolina’s legislature introduced a NIL bill on January 14, 2020.⁵⁹ Although the bill has since been replaced by another NIL bill, it contained two unique features that other NIL bills do not.⁶⁰ First, the bill provided for the creation of a state-maintained college athletics trust and would have required South Carolina universities to pay into the trust \$5,000 annually for each student-athlete participating in football and men’s and women’s basketball (capped at \$25,000 per athlete).⁶¹ Upon graduation, the

⁵⁵ Cf. Kathryn Kiska-Schulze & Adam Epstein, “*Show Me the Money!*”—*Analyzing the Potential State Tax Implications of Paying Student-Athletes*, 14 VA. SPORTS & ENT. L.J. 13, 30–32 (2014) (suggesting that state income tax plays a role in professional athletes’ choice of teams and that state income tax in a “pay-for-play” model of college athlete compensation would similarly encourage school shopping amongst prospective college athletes, eliciting demands for higher salaries from colleges in states with a personal income tax).

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ John DiMascio, *The “Jock Tax”: Fair Play or Unsportsmanlike Conduct*, 68 U. PITT. L. REV. 953, 955–56 (2007).

⁵⁹ S.B. 935, 123rd Gen. Assemb., Reg. Sess. (S.C. 2019).

⁶⁰ *Id.* § 3.

⁶¹ *Id.* (adding §§ 59-101-1010, -1020(A)).

trust fund payments were to be paid out to the student-athlete.⁶² Additionally, the bill would have required each South Carolina university to pay annual stipends to college athletes at a university-determined hourly rate for hours student-athletes commit to their sport.⁶³ The bill states that the stipend “is not considered ‘income’ for state income tax purposes,” but is instead considered “financial aid for educational purposes.”⁶⁴ To be entitled to the stipend and annual trust fund deposit a student-athlete must maintain “good academic standing.”⁶⁵

B. Tax Consequences of the South Carolina Proposals

1. Annual Stipend Payments

Implementing a system under which students receive stipends for hours committed to a sport at the state level may have more favorable outcomes than the common features of the other NIL bills discussed above. However, such a system may still cause unintended tax consequences for student-athletes and schools.

First, because the stipend is directly tied to hours committed to playing a sport, the stipend will not be excluded from income as a “qualified scholarship” because it is “payment for . . . services by the student required as a condition for receiving the [funds].”⁶⁶ Thus, although student-athletes would be exempt from state income tax on receipt of the stipend payments, such payments would be subject to federal income tax and included in gross income.⁶⁷

Additionally, tying the stipend payments to hours committed to a sport seems to directly violate NCAA rules as direct compensation for athletic performance. The NCAA continues to take a strong stance against such direct

⁶² *Id.* (adding § 59-101-1020(B)).

⁶³ *Id.* § 2 (adding § 59-101-910).

⁶⁴ *Id.* § 1 (adding § 59-157-50).

⁶⁵ *Id.* §§ 2, 3 (adding §§ 59-101-910, -1020(A)).

⁶⁶ I.R.C. § 117(c).

⁶⁷ *Id.*; *see id.* § 61.

payments, and it would likely disqualify students receiving such payments from participation in NCAA-sanctioned events.⁶⁸ However, NCAA bylaws *do* permit student-athletes to receive stipends for “other expenses related to attendance,” as long as they “cover[] other expenses related to attendance in combination with other permissible elements of financial aid” subject to certain dollar limitations.⁶⁹ But the statute confusingly states that “[a]ll stipends . . . shall be in addition to any scholarship, including the cost of attendance or financial aid,” but that “for state income tax purposes,” the stipends “are financial aid for educational purposes.”⁷⁰ Thus, it is unclear whether the NCAA would permit such payments under the current bylaws.

In the seemingly unlikely event that the NCAA were to allow such payments, public institutions would still maintain their federal tax-exempt status as intergovernmental bodies or providing essential government services.⁷¹ However, the IRS may have a difficult time allowing a private university with a profitable athletics program to claim tax-exempt status under § 503(c)(3) for *direct* payments to student-athletes for their participation in sports. Such payments would likely be considered “unrelated business income” if they were to become too substantial for the IRS to stomach.⁷² Although such payments are formally “for educational purposes,” the substance of the payment would be very difficult to overlook.⁷³ On the other hand, such universities could point to the requirement that a student maintain “good academic standing” to be entitled to stipend payments as evidence of promoting education in support of maintaining their tax-exempt status.⁷⁴

Additionally, many states require taxpayers to remit state income taxes on income earned within their state often using complex allocation and

⁶⁸ NCAA BYLAWS 12.1.2, -2.1.

⁶⁹ *Id.* at 15.2.4, -6.3–6.4.

⁷⁰ S.B. 935, 123rd Gen. Assemb., Reg. Sess., § 2 (S.C. 2019) (adding § 59-101-910(C)).

⁷¹ *See* Colombo, *supra* note 29, at 112.

⁷² *See* Erin Guruli, *Commerciality of Collegiate Sports: Should the IRS Intercept?*, 12 SPORTS L.J. 43, 49 (2005) (discussing the test courts apply in determining whether an activity is “unrelated business income” subject to UBIT); *see also* I.R.C. § 513(a)(1)–(3) (defining “unrelated business income”).

⁷³ S.B. 935, 123rd Gen. Assemb., Reg. Sess., § 2 (S.C. 2019) (adding § 59-101-930).

⁷⁴ *Id.* (adding §§ 59-101-910, -1020(A)).

apportionment methods.⁷⁵ These “jock” taxes and state income taxes are numerous and nonuniform throughout the country, strapping student-athletes with the burden of navigating multiple state income and jock taxes in addition to balancing academics and their respective sports would be unreasonable—unless they are either compensated sufficiently to be able to outsource their tax filings to a professional or their institution provides them with professional tax services.⁷⁶

2. State-Administered Athlete Trust Fund

South Carolina’s proposed athlete trust fund mechanism may also have unintended consequences for student-athletes and schools. For a student-athlete to be entitled to trust fund payments, he or she must *graduate* from their respective university.⁷⁷ This requirement enables private schools to protect themselves from losing tax exemption by citing this requirement as evidence of promoting education. For example, a student-athlete who is undecided about entering a professional draft would be incentivized to finish school to be entitled to his trust fund deposits. However, the graduation requirement does not avoid running afoul of NCAA bylaws: “An individual loses amateur status and [is ineligible to compete] in a particular sport if the individual . . . [a]ccepts a promise of pay *even if pay is to be received following completion of intercollegiate athletics participation.*”⁷⁸

While the bill prevents the NCAA from barring student-athletes from competition for the use of the student’s NIL, it does not prevent the NCAA

⁷⁵ Scott Drenkard, *A Very Short Primer on Tax Nexus, Apportionment, and Throwback Rule*, TAX FOUND. (Mar. 28, 2016), <https://taxfoundation.org/very-short-primer-tax-nexus-apportionment-and-throwback-rule/>.

⁷⁶ *Id.* Though a full discussion is beyond the scope of this paper, it should be noted that jock taxes are generally at best questionably constitutional, and, at worst, plainly unconstitutional. See Jared Walczak, *Pittsburgh Claims Home-Field Advantage, but Visiting Athletes Cry Foul*, TAX FOUND. (Nov. 8, 2019), <https://taxfoundation.org/pittsburgh-jock-tax/>. For a thorough discussion on administrability issues regarding jock taxes, see Elizabeth C. Ekmekjian et al., *The Jock Tax Contest: Professional Athletes vs. the States—Background and Current Developments*, 20 J. APPLIED BUS. RSCH. 19, 19–32 (2004).

⁷⁷ S.B. 935, 123rd Gen. Assemb., Reg. Sess., § 3 (S.C. 2019) (adding § 59-101-1020(B)) (“*After the fulfillment of all academic requirements for graduation and the completion of a state-approved financial literacy course by a student athlete, his participating institution shall provide a one-time payment to the student athlete in the full amount deposited on his behalf in the fund. Payments must be made thirty days after graduation.*” (emphasis added)).

⁷⁸ NCAA BYLAWS 12.1.2(b) (emphasis added).

from barring student-athletes from participation for receiving direct or indirect compensation for participation in intercollegiate sports.⁷⁹

Aside from NCAA compliance issues, the graduation requirement might help student-athletes avoid multistate income tax filings, depending on how aggressive state revenue collection agencies choose to be. Because student-athletes must both maintain good academic standing *and* graduate from the university to be entitled to the funds, the funds are more closely tied to education than, for example, the stipend payments which are directly tied to hours participating in a sport. However, because the funds are only issued to student-athletes, a state revenue agency theoretically could choose to require student-athletes to attribute a percentage of the funds earned to games played within its jurisdiction, by way of an income or jock tax.⁸⁰ As discussed above with respect to stipend payments, allocating and apportioning the percentage of the trust fund payments would be very difficult and complex for a student-athlete who played games in multiple states over their four-year collegiate athletics career.⁸¹

VI. SOLUTION: FEDERAL REGULATION OF INTERCOLLEGIATE ATHLETICS

To avoid the many issues discussed above that will develop as a result of nonuniform state NIL legislation, federal government intervention is necessary to ensure the vitality and continuity of the intercollegiate system, and to create a system of taxing intercollegiate athletes and schools that is equitable to the parties involved, efficient in taxing revenues, and easier to administer.

The federal government should pass legislation that will allow the NCAA to continue to operate, but that both directly and indirectly regulates the NCAA and (borrowing language from South Carolina’s NIL bill) any other “state or national federation or association that promotes or regulates

⁷⁹ S.C. S.B. 935 § 1 (adding § 59-157-20(B)) (“A state or national federation or association that promotes or regulates intercollegiate sports, including, but not limited to, the National Collegiate Athletic Association, shall not prevent a student athlete of an institution of higher learning who is participating in intercollegiate sports from earning compensation as a result of the use of the student athlete’s name, image, or likeness.”).

⁸⁰ *E.g.*, see *supra* notes 77–79 and accompanying text.

⁸¹ Drenkard, *supra* note 75.

intercollegiate sports,” in order to provide uniform treatment of non-NCAA member organizations.⁸² The Student Athlete Level Playing Field Act, which was reintroduced in the House of Representatives in April 2021, does not go far enough in regulating college athletics and ensuring that student athletes are fairly compensated.⁸³ Essentially, the Student Athlete Level Playing Field Act forbids the NCAA from prohibiting student-athletes from participating in NCAA-sanctioned events solely because the student-athlete profits from his or her name, image, and likeness.⁸⁴

My proposed legislation (the “Proposed Act”) would prohibit collegiate athletics regulating bodies from implementing rules that (1) bar student-athletes from receiving any payments that such student-athletes becomes entitled to as a result of action taken by an institution of higher learning as a result the Proposed Act; (2) bar athletes from participation, and their respective schools from membership, for profiting from their NIL; and (3) bar student-athletes from participation, and their respective schools from membership, for payments made pro rata to all members of a collegiate sports team from their institution’s athletic program’s ticket and merchandise sales. Any payments received by a student-athlete made out of ticket and merchandise sales would be subject to federal income tax at ordinary rates but would be eligible for deferral and subject to ordinary income rates if placed into a federally created trust account and not withdrawn until graduation.

Additionally, the Proposed Act would create an exemption from federal income tax starting at \$10,000 per year per taxpayer (annually adjusted for inflation) for stipends received from state-accredited universities for the purpose of covering (and that are actually used to cover) room and board, living expenses, professional financial and tax advice or courses relating to

⁸² S.C. S.B. 935 § 1 (adding § 59-157-20(B)).

⁸³ See Student Athlete Level Playing Field Act, H.R. 8382, 116th Cong. (2020); Press Release, Rep. Emmanuel Cleaver, Cleaver, Gonzalez Reintroduce Legislation to Grant Name, Image, and Likeness to Student Athletes with Bipartisan Support (Apr. 26, 2021), <https://cleaver.house.gov/media-center/press-releases/cleaver-gonzalez-reintroduce-legislation-to-grant-name-image-and>.

⁸⁴ *Id.* The bill does not mention the NCAA by name, but it is specifically targeted at the NCAA, particularly Division I sports. Additionally, the bill has several exceptions; for example, the bill would still allow the NCAA to prohibit student-athletes from promoting alcohol, marijuana dispensaries, and casinos. *Id.* § 2(a)(2).

financial management or tax, or support of an individual's family.⁸⁵ Further, any amount that is not actually spent on the above categories would still be eligible for exemption if placed into a federally created trust account that would accrue interest and would become available to individuals upon graduation from an accredited university.⁸⁶ If a student withdraws the funds early without demonstrating "cause," then the amounts will be subject to ordinary income tax treatment.

This federally regulated scheme would help to solve most of the problems that will otherwise be created by a patchwork, state-regulated scheme. First, by preempting state NIL legislation, the Proposed Act would help create a more uniform regulatory system. However, while a federal act will preempt states from passing laws contrary to it, states would still be able to pass NIL laws that do not directly conflict with the federal legislation. For example, Maryland's legislature has proposed an act mandating the creation of a collective bargaining process for student-athletes, which would not be preempted by the Proposed Act.⁸⁷

Additionally, the exclusion from income will help simplify tax filings for NIL-compensated student-athletes; and the allowance for financial education and professional services will encourage student-athletes to manage their finances responsibly, which is important for elite athletes who might enter into large endorsement contracts.⁸⁸ Additionally, the federal scheme would help simplify tax filing for NIL-compensated student-athletes through the allowance of the federal exemption for financial or tax services.

⁸⁵ The idea of allowance of a stipend is drawn from South Carolina's proposed NIL bill, as well. S.C. S.B. 935 § 2 (adding § 59-101-900).

⁸⁶ The idea of a government trust fund for student athletes is also drawn from South Carolina's proposed NIL bill. *Id.* § 3 (adding § 59-101-1000).

⁸⁷ H.D. 548, 439th Gen. Assemb., 2019 Reg. Sess. (Md. 2019).

⁸⁸ "Proper and proactive financial planning could help ensure these student-athletes and their families correctly consider and handle this new NCAA rule this [sic] will go a long way in in [sic] having these elite athletes be much better prepared for lives as professional athletes." Brian Menickella, *Wealth Management for Student Athletes: The Implications of NCAA's Newest Rule for Students and Their Families*, FORBES (Nov. 13, 2019), <https://www.forbes.com/sites/brianmenickella/2019/11/13/wealth-management-for-student-athletes-the-implications-of-ncaas-newest-rule-for-students-and-their-families/#2d9a6b6c580d>.

Moreover, federally preempting the NCAA from implementing rules barring institutions and student-athletes from participation in NCAA-sanctioned events due to students being compensated for the use of their NIL would eliminate the current standoff between state legislators and colleges and the NCAA regarding student NIL compensation.⁸⁹ The Proposed Act would also allow schools to compensate all players on a given team from merchandise sales which those student-athletes help generate, allowing student-athletes to directly share in the university's profits from their respective sports. Thus, the Proposed Act solves many of the issues that a state-regulated NIL legislation scheme will otherwise cause.

⁸⁹ See Murphy, *supra* note 6.